

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KURT A. BENSHOOF and BRIANA D.
GAGE,

Plaintiffs,

v.

CITY OF SHORELINE, KING COUNTY,
TOWN & COUNTRY MARKETS, EVAN B.
FAGAN, WILLIAM C AKERS, and
MR. THOMPSON,

Defendants.

Case No. 2:24-cv-00343-TL

REPLY IN SUPPORT OF DEFENDANTS
TOWN & COUNTRY MARKETS, INC.
AND EVAN B. FAGAN'S MOTION TO
DISMISS

**Noted for Motion Calendar:
July 29, 2024**

Defendants¹ filed their motion to dismiss on July 1, 2024, with a noting date of July 29, 2024. Plaintiffs' opposition to Defendants' motion was due on July 22, 2024. Plaintiffs did not file an opposition. Upon information and belief, Mr. Benshoof has been incarcerated in Seattle at the King County Correctional Facility since July 3, 2024. Nonetheless, given the Court's authority to *sua sponte* dismiss a complaint for lack of subject matter jurisdiction and/or failure to state a claim, Defendants ask the Court to decide their motion and dismiss Plaintiffs' claims against them with prejudice. *See Scholastic Entertainment, Inc. v. Fox Entertainment Group, Inc.*, 336 F.3d 982, 985 (9th Cir. 2003) (providing that a party is not entitled to notice and an opportunity to respond when a court contemplates dismissing a claim for lack of subject matter

¹ Defendants continue use of the naming conventions adopted in Defendants Town & Country Markets, Inc. and Evan B. Fagan's Motion to Dismiss. (*See* Dkt. No. 43.)

jurisdiction); *Sparling v. Hoffman Const. Co., Inc.*, 864 F.2d 635, 638 (9th Cir. 1988) (providing that a trial court may act on its own initiative to dismiss a complaint for failure to state a claim without giving the plaintiffs notice and an opportunity to respond where the plaintiffs cannot possibly win relief).

To the extent the Court declines to decide Defendants’ motion and allows Mr. Benshoof an opportunity to respond, Defendants ask that the Court merely grant Mr. Benshoof an extension of time to respond and not stay the case indefinitely. In determining whether to stay an action, the Court must weigh “the competing interests which will be affected by the granting or refusal to grant a stay.” *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962). Such interests include the possible damage that may result from the granting of a stay, the hardship or inequity that a party may suffer in being required to go forward, and the orderly course of justice measured in terms of simplifying or complicating of issues, proof, and questions of law that could be expected to result from a stay. *Id.*

“The proponent of a stay bears the burden of establishing its need.” *Clinton v. Jones*, 520 U.S. 681, 708, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997). “[I]f there is even a fair possibility that the stay . . . will work some damage to someone else[,]” the party seeking the stay “must make out a clear case of hardship or inequity.” *Landis v. North American Co.*, 299 U.S. 248, 255, 57 S. Ct. 163, 81 L. Ed. 2d 153 (1936). Based on the “Judicial Notice” filed on July 22, 2024, Mr. Benshoof has purportedly communicated with Howard Brown and asked Mr. Brown to request a stay of this case “until such time that Mr. Benshoof can resume his adjudication of these matters himself.” (*See* Dkt. No. 51.) However, in *Wimberly v. Rogers*, 557 F.2d 671, 673 (9th Cir. 1977), the Ninth Circuit held that a district court’s “indefinite stay of all proceedings” was “tantamount to a denial of due process,” explaining, “[s]imply because a person is incarcerated does not mean that he is stripped of free access to the courts and the use of legal process to remedy civil wrongs.” It is clear from the Judicial Notice and attached documents that Mr. Benshoof has at least had the ability to communicate with multiple individuals and coordinate several court filings during his incarceration. He has not established that he has been completely stripped of his free

1 access to the courts. Moreover, staying the litigation indefinitely would result in undue delay in
2 deciding Defendants' motion. For these reasons, if the Court is inclined to allow Mr. Benshoof
3 additional time to respond, it should nonetheless decline to grant a stay of proceedings.

4 DATED this 29th day of July, 2024.

5 SOCIUS LAW GROUP, PLLC

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7 By: s/Adam R. Asher
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10 *Attorneys for Defendants Town & Country*
11 *Markets, Inc. and Evan B. Fagan*
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on this date I filed the foregoing document with the clerk of the court using the CM/ECF filing application, which automatically notifies parties of record of this filing, and served a courtesy copy *via email* as follows:

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DATED July 29, 2024, at Seattle, Washington

s/Leslie Boston
Leslie Boston, Paralegal